Truserv Corporation *and* Roger E. Huard, Petitioner *and* International Brotherhood of Teamsters, Local No. 633.[1] Case 1–RD–1987

January 31, 2007

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN SCHAUMBER, KIRSANOW, AND WALSH

This case involves a decertification petition seeking to remove the Union as the exclusive bargaining representative of the Employer's drivers. The issue presented is the effect of a settlement of an 8(a)(5) unfair labor practice charge upon the right of the drivers to proceed with the decertification petition, which was filed after the alleged unlawful conduct by the Employer but before the execution of the settlement agreement between the Employer and the Union. Thus, this case involves the following sequence of events: allegedly unlawful conduct; the filing of a decertification petition; the settlement of the unfair labor practice case alleging the unlawful conduct, which settlement does not include an admission of unlawful conduct on the part of the Employer. The issue is whether to dismiss the petition or to resume the processing of the petition after the unfair labor practice case has been settled.

As discussed below, we hold that, after the unfair labor practice case has been settled, the decertification petition can be processed and an election can be held after the completion of the remedial period associated with the settlement of the unfair labor practice charge. We reach this result because the employer conduct in question is only alleged to be unlawful, and thus there is no basis on which to dismiss the petition. Further, we reach this result even if the postpetition settlement includes a contract reached between the employer and the union.[2] However, a decertification petition may not be processed, if (a) the execution of the settlement of the unfair labor practice charge comes before the filing of the petition; (b) the Regional Director finds that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the employer; or (c) the settlement of the unfair labor practice charge includes an agreement by the decertification petitioner to withdraw the petition.

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] For under extant principles, a contract bars the processing of a petition only if the petition is filed after the signing of the agreement. See *Appalachian Shale Products Co.,* 121 NLRB 1160, 1161 (1958); *De Paul Adult Care Communities*, 325 NLRB 681 (1998).

I. STATEMENT OF THE CASE

On June 13, 2003, the Acting Regional Director for Region 1 administratively dismissed the decertification petition filed by the Petitioner on August 2, 2002. The Acting Regional Director relied on the Board's decision in *Douglas-Randall, Inc.,* 320 NLRB 431 (1995), and its progeny,[3] holding that where the parties have entered into a settlement of outstanding unfair labor practice charges, and the settlement requires recognition and bargaining with the union, any petition challenging the union's majority status that is filed after the allegedly unlawful conduct, but before the settlement, must be dismissed. The Acting Regional Director also cited *Supershuttle of Orange County,* 330 NLRB 1016 (2000), in which the Board dismissed a petition where the parties resolved the outstanding unfair labor practice issues through execution of a new collective-bargaining agreement, and the unfair labor practice charges were withdrawn. Relying on these decisions, the Acting Regional Director found that the unfair labor practice charge in this case involved alleged conduct that was in derogation of the bargaining relationship between the Employer and the Union and predated the filing of the petition, and thus gave rise to the presumption that the decertification effort was influenced by the alleged misconduct. As such, the Acting Regional Director dismissed the petition.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer and the Petitioner filed timely separate requests for review, to which the Union filed an opposition.[4] The Employer subsequently filed a memorandum of recent authority, arguing that the Board's decision in *Saint Gobain Abrasives, Inc.,* 342 NLRB 434 (2004), overruled *Priority One Services,* 331 NLRB 1527 (2000), which therefore should in turn warrant overruling *Supershuttle of Orange County*, supra, upon which *Priority One* relied. The Union filed an opposition to this memorandum, arguing that the Board's holding in *Saint Gobain* is inapplicable to this case. By Order dated August 17, 2004, the Board granted review. The Employer filed a brief on review.

Having carefully reviewed the entire record in this proceeding, including the brief on review, we reverse the Acting Regional Director's dismissal and reinstate the petition. As fully explained below, we agree with the reasoning of former Member Cohen in his dissent in *Douglas-Randall,*[5] and the dissents of former Member Hurtgen in *Liberty Fabrics*[6] and *Supershuttle.*[7] Like

[3] *Liberty Fabrics, Inc.,* 327 NLRB 38 (1998), and *Supershuttle of Orange County,* 330 NLRB 1016 (2000).

[4] The Employer argues in its request for review, inter alia, that the Board should overrule *Douglas-Randall* and its progeny and reinstate the petition.

[5] 320 NLRB at 435–436.

[6] 327 NLRB at 39.

[7] 330 NLRB at 1018–1019.

them, we conclude that, absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices. To do so would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section 7 of the Act. Accordingly, we overrule the Board's decisions in *Douglas-Randall, Liberty Fabrics*, and *Supershuttle.* In doing so, we return to the doctrine enunciated in *Passavant Health Center*, 278 NLRB 483 (1986), and its progeny.

II. BACKGROUND

The Employer, TruServ Corporation (TruServ), is a cooperative comprised of member retailers who conduct business under the names True Value, Grand Rental Station, Taylor Rental, Induserve Supply, Home & Garden Showplace, and Party Central. The individual storeowners own and operate their businesses independently from one another, but collectively own TruServ as their wholesale buying group and distributor.

International Brotherhood of Teamsters, Local No. 633 (the Union), represents the drivers and warehouse employees of the Employer in separate units. The Union and the Employer were parties to two collective-bargaining agreements that covered the drivers and warehouse employees, respectively, for the period March 19, 2000, to October 31, 2002.

On December 7, 2001, the Union filed an unfair labor practice charge alleging, inter alia, that in September 2001, the Employer unilaterally changed the employees' healthcare benefit package and pension benefits, and in November 2001 failed to make a contractually required payment to employees.

On February 5, 2002, the Region deferred the charge to arbitration under *Collyer Insulated Wire,* 192 NLRB 837 (1971). Subsequently, in August 2002, the Petitioner, a driver working for the Employer, filed a petition to decertify the Union as the exclusive representative of the drivers' unit. As a result of the pending unfair labor practice charge, on August 13, 2002, the Regional Director found that the petition was "blocked" and held the petition in abeyance pending the disposition of the charge.[8]

The Employer and the Union commenced collective-bargaining negotiations in October 2002, and in February 2003 the drivers ratified an agreement covering the term of November 1, 2002, to October 31, 2005. At about the same time, the parties also entered into a "Letter of Understanding" that included, inter alia, the Union's agreement to withdraw the pending unfair labor practice charge and the related grievance.

On May 9, 2003, the Employer signed the collective-bargaining agreement covering the drivers, and on May 23, 2003, the Union filed a letter with the Regional Office withdrawing the unfair labor practice charge. The Acting Regional Director subsequently dismissed the decertification petition in accordance with the Board's decisions in *Douglas-Randall, Liberty Fabrics, Inc.,* and *Supershuttle of Orange County.*

III. ANALYSIS

For the reasons set forth by former Member Cohen in his dissent in *Douglas-Randall* and former Member Hurtgen in his dissents in *Liberty Fabrics* and *Supershuttle,* we do not dismiss the employees' decertification petition, even though the Union and the Employer entered into a collective-bargaining agreement resolving the pending unfair labor practice charge. In our opinion, the Board's decision in *Douglas-Randall* unjustly deprives employees of their statutory rights by requiring dismissal of a decertification petition after the settlement of the charge. Thus, a timely filed decertification petition that has met all of the Board's requirements should be reinstated and processed at the petitioner's request following the parties' settlement and resolution of the unfair labor practice charge.

As discussed more fully below, we return to *Passavant Health Center*, supra, and its progeny—*Island Spring, Nu-Aimco,* and *Jefferson Hotel*,[9] the precedent that existed prior to *Douglas-Randall.* Those cases teach that a settlement agreement is not an admission that the employer's actions, alleged but not found to be unlawful, constituted an unfair labor practice unless such an admission is an express part of the agreement. Consequently, the fact that the alleged actions occurred prior to the filing of the decertification petition provides no basis for a conclusion that the petition was tainted by unlawful conduct.

Beginning with *City Markets,* 273 NLRB 469 (1984), the Board held that decertification petitions should not be dismissed after the resolution of charges. In *City Markets,* decertification petitions in two separate units had been dismissed, subject to reinstatement, because the alleged 8(a)(5) violation precluded the raising of a question concerning representation. Thereafter, the union and the employer reached agreement on a new collective-bargaining agreement covering both units, and the charges were withdrawn. The petitioners then requested reinstatement of the decertification petitions. The union argued that the petitions were barred by the contracts. The Board held that a contract entered into during a period when a decertification petition is blocked by charges will not bar the processing of an otherwise timely-filed petition when the charges are withdrawn. The Board noted that the unfair labor practice charges had been

[8] The "blocking" issue and the Regional Director's August 13, 2002 disposition of the petition is not before us. The issue before us concerns the Acting Regional Director's administrative dismissal of the instant petition on June 13, 2003.

[9] *Island Spring,* 278 NLRB 913 (1986); *Nu-Aimco, Inc.,* 306 NLRB 978 (1992); and *Jefferson Hotel,* 309 NLRB 705 (1992).

withdrawn, and therefore the unfair labor practice proceedings for which the petitions were dismissed would not take place. Thus, the considerations that caused the Board to dismiss the petitions were no longer present. The Board therefore reinstated the petitions despite the execution of the new collective-bargaining agreement.

In *Passavant Health Center*, supra, the Board extended the reasoning set forth in *City Markets* to situations involving settlement agreements. In *Passavant,* the decertification petitions, timely filed after the parties' existing contract had expired, were dismissed because of unresolved 8(a)(5) and (1) charges. The parties subsequently entered into a bilateral settlement agreement containing a nonadmission clause, the parties executed a new collective-bargaining agreement, and the charges were withdrawn. The Regional Director, however, denied the petitioners' requests to reinstate the petitions, finding that they were barred by the new collective-bargaining agreement between the parties. The Board, following *City Markets,* reversed the Regional Director's decision, concluding that because the charges had been withdrawn and the terms of the settlement agreement had been satisfied, the petitions should be reinstated. The majority concluded that although *Passavant* involved a settlement agreement, and *City Markets* did not, that fact did not require a different result. This was because the settlement agreement, which included a nonadmission clause, did not constitute an admission that the employer had committed an unfair labor practice, and thus there was no basis upon which to find that the petitions had been "tainted" by unlawful conduct.

Under similar circumstances in *Island Spring,* the Board held that it was appropriate to reinstate a decertification petition even though the settlement agreement resolving the unfair labor practice allegations, unlike the one in *Passavant,* did not contain a nonadmission clause. The Board majority held that the absence of a nonadmission clause did not warrant a contrary result from that reached in *Passavant* because the employer had neither admitted the charges nor been found to have committed unfair labor practices.

The Board further extended *Passavant* and *Island Spring* in *Nu-Aimco.* *Nu-Aimco* involved a unilateral settlement agreement where the union objected to the settlement and refused to join it because the agreement did not require dismissal of the decertification petition. The Board noted the union's concerns, but pointed out that the Regional Director could have included the petitioner in the settlement discussions and could have taken the position that the settlement agreement would only be approved if it precluded reinstatement of the decertification petition. Because the Regional Director did not do this, but instead accepted the settlement agreement without seeking any additional remedies, the Board affirmed the Regional Director's processing of the petition, noting that there had been no finding by the Board or admission by the employer that the employer had committed any unfair labor practices.

Shortly thereafter, in *Jefferson Hotel* the Board noted that its intention in *Nu-Aimco* was that the petitioner could be included in the settlement discussions to allow for the possibility that he or she would agree to a settlement that provides for dismissal of the petition. Without the petitioner's consent to such an agreement, however, the Board stated that the petitioner was not bound to a settlement by others purporting to waive the petitioner's rights under the Act. Accordingly, the Board reinstated the decertification petition.

In *Douglas-Randall*, the Board majority reversed course, departing from this established precedent and overturning *Passavant* and its progeny. The Board majority held that the settlement of an unfair labor practice charge by a union and an employer bars the processing of a decertification petition. The facts *in Douglas-Randall* are similar to those in the Board's prior cases: the union filed unfair labor practice charges alleging that the employer refused to bargain; a petition for decertification was filed, which was held in abeyance; and the parties entered into an agreement settling the alleged unfair labor practices. The Board majority in *Douglas-Randall* held that, following the settlement agreement, "a reasonable time must be afforded in which a status fixed by the agreement is to operate." 320 NLRB at 432, citing *Poole Foundry & Machine Co. v. NLRB,* 192 F.2d 740, 743 (4th Cir. 1951).

As demonstrated by former Member Cohen in his dissent in *Douglas-Randall*,[10] however, the facts of *Poole* are distinguishable from *Douglas-Randall* and those in this case. In *Poole*, the decertification petition was filed less than 3 months *after* the settlement agreement was entered into by the parties. As a result and based on the decertification petition, the employer then refused to bargain with the union in violation of the settlement agreement. *Poole Foundry & Machine Co.,* 95 NLRB 34, 35 (1951), enfd. 192 F.2d 740 (4th Cir. 1951). The Board in *Poole* held that under the circumstances, the employer "was under an obligation to honor that agreement for a reasonable time after its execution without questioning the representative status of the Union." Id. at 36; see also *BPH & Co. v. NLRB,* 333 F.3d 213, 221 (D.C. Cir. 2003). In sum, an employer who agrees in a settlement agreement to bargain must do so for a reasonable period, and a decertification petition filed *after* such a settlement and during that reasonable period must be dismissed. Nothing in *Poole*, however, can be construed to mean that such a settlement agreement constitutes a bar to the processing of a decertification petition filed *before* the settlement. The difference is significant. In the *Poole* scenario, the Board precludes the *raising* of a question concerning representation in derogation of the em-

[10] 320 NLRB at 435.

ployer's prior agreement to bargain. Here, as in *Douglas-Randall,* the issue is whether an *already raised*, previously existing question concerning representation is to be nullified, absent a showing or admission of tainting conduct and in derogation of the employees' Section 7 rights, because of a subsequent agreement to bargain entered into by the employer and the union without securing the agreement of the decertification petitioner to withdraw his or her petition.

In *Liberty Fabrics,* supra, a Board majority extended *Douglas-Randall* to non-Board settlements. There, a union filed unfair labor practice charges that blocked the processing of a decertification petition. The employer and the union subsequently entered into a private, non-Board settlement agreement providing for a collective-bargaining agreement and the withdrawal of the charges. As in *Douglas-Randall,* the Board majority in *Liberty Fabrics* held that because the petition was filed after the alleged unfair labor practices, there was a presumption that the decertification effort was influenced by the alleged misconduct. 327 NLRB at 38. In his dissent in *Liberty Fabrics,* former Member Hurtgen indicated his agreement with the dissent of former Member Cohen in *Douglas-Randall,* i.e., that the majority's dismissal of the petition, despite the fact that no unlawful "tainting" conduct had been found, was "flatly inconsistent with the statutory policy of protecting the Section 7 rights of employees to refrain from union activity if they choose." 327 NLRB at 39.

In *Supershuttle,* supra, a Board majority extended the reasoning of *Douglas-Randall* and *Liberty Fabrics*, this time to a situation where the parties' negotiation of a collective-bargaining agreement was intended to resolve outstanding 8(a)(5) and (1) charges. The Board majority in *Supershuttle* held that the collective-bargaining agreement precluded a rival union's petition that was filed after the onset of the alleged illegal conduct. The Board majority found that the parties in *Supershuttle* resolved the unfair labor practice charges when they negotiated and agreed to a new collective-bargaining agreement, and held that the holdings of *Douglas-Randall* and *Liberty Fabrics* applied, requiring that the petition be dismissed. In his dissent, former Member Hurtgen reiterated his concern that the petition was being dismissed despite no finding of unlawful conduct, and criticized the "further erosion of the fundamental right of employees to choose, reject, or change a bargaining representative." 330 NLRB at 1018.

As the dissents in *Douglas-Randall*, *Liberty Fabrics,* and *Supershuttle* point out, the Board majority in those cases was not justified in reversing Board precedent on this issue and, in doing so, impinging on employees' rights under the Act. The Board's reasoning in *City Markets, Passavant, Nu-Aimco,* and similar cases recognizes that a settlement of an outstanding unfair labor practice allegation does not constitute an admission by a charged party, or an adjudication by the Board, that an unfair labor practice has been committed. For example, in *City Markets,* the union, which argued that the withdrawn complaint alleging a violation of Section 8(a)(5) precluded reinstatement of the petitions, in effect was urging the Board to find that the refusal-to-bargain allegations were meritorious based solely on the Regional Director's issuance of a complaint. However, the charges subsequently were withdrawn, the complaint was dismissed, and no evidence was ever presented indicating that the employer had engaged in conduct that would require finding that the decertification petitions should not be processed. Thus, there was no basis for concluding that the employer had engaged in unfair labor practices that tainted and precluded reinstating the petitions.[11] In his dissent in *Supershuttle,* former Member Hurtgen noted that the Board in *Passavant* correctly found that "[t]here was no *finding* of alleged 8(a)(5) conduct, and thus there was no basis upon which to dismiss (as tainted) the decertification petition" (emphasis in original). See also *BPH & Co.,* supra, 333 F.3d at 222 ("The only evidence on which the Board based its finding that the Company's [unfair labor practices] caused the loss of support for the Union is the [settlement] Agreement—an Agreement that specifically provides that the Company admitted no wrongdoing. This falls far short of satisfying the substantial evidence standard.").

The Board majority in *Douglas-Randall* expressed concern that processing a petition in this type of circumstance would discourage settlement or resolution of charges and/or encourage employers to commit unfair labor practices. We do not think these concerns are valid. As to the first stated concern, employers' incentive to settle charges will not likely be affected. Employers often agree to settle alleged unfair labor practices for a variety of economic and practical considerations despite their belief that they have engaged in no unlawful conduct. For example, employers may wish to settle simply to avoid costly and time-consuming litigation. If a settlement will result in the processing of the decertification petition, we do not see how that would discourage the employer from settling. On the other hand, if the employer does not settle, and if the Board finds unlawful conduct, that will likely result in the dismissal of the decertification petition.

We acknowledge that unions may feel a diminished incentive to settle under the rule we return to today. But we do not accord that consideration the same weight our colleagues do, for two reasons. First, nothing in our decision precludes the involvement of the petitioner in the settlement process to secure a withdrawal of the petition. Where this can be accomplished, the union's incentive to

[11] *City Markets,* 273 NLRB at 470 fn. 3 (Member Zimmerman, concurring). Likewise, in *Douglas-Randall*, 278 NLRB at 484 fn. 3, the Board noted that a settlement agreement does not constitute an admission by the employer.

settle will be no different from what it has been under *Douglas-Randall*. Second, if the settlement is a good one from the union's standpoint, the union will settle and seek to prevail in the election. We recognize that there will be cases where the union chooses not to settle if the settlement will result in the processing of the petition. In those cases, the Regional Director can choose not to approve the settlement *or* he or she can choose to approve it over the union's objection. In the latter event, he or she determines that Section 7 rights should prevail.

The dissent says that *Douglas-Randall* protects employee free choice by ensuring that no petitions tainted by alleged unfair labor practices are processed. But *Douglas-Randall* encompasses that end by throwing the baby out with the bathwater. *Douglas-Randall* ensures that *no* presettlement petitions are processed, period, regardless of whether the allegations in any given case have merit or, if they do, whether a causal nexus exists between the employer's conduct and the employees' disaffection with the union. To ensure the dismissal of all tainted petitions, *Douglas-Randall* carries the risk of dismissing all untainted ones as well.

It is, of course, true that our return to *Passavant* carries the opposite risk of permitting a tainted petition to be processed. That is, the conduct may be unlawful but the settlement precludes an adjudication of that fact. However, *Passavant* permits and even encourages the union and Regional Director to include the decertification petitioner in the settlement talks. And where the risk of taint is greatest, the union and the Region would be able to make the most persuasive case to the petitioner for voluntary withdrawal of the petition by explaining to the petitioner that it is the employer's unlawful conduct, not the union's performance, that led to the disaffection from the union.

We regard as unfounded the *Douglas-Randall* majority's second concern: that employers would be encouraged to engage in unlawful conduct and thereafter settle the resulting charge without admitting liability, and then benefit from their conduct when the petition is allowed to go forward. Of course, under *Poole Foundry*, the employer cannot thus benefit from a petition *filed* postsettlement. See 95 NLRB at 36; *Freedom WLNE-TV, Inc.*, 295 NLRB 634 (1989). Our decision today does not affect that precedent. Further, an employer who is found to have instigated an employee petition will not achieve the result sought. A petition will be dismissed on traditional grounds if it is instigated by the employer. See *Canter's Fairfax Restaurant,* 309 NLRB 883, 884 (1992). Finally, the Regional Director can decline to approve a settlement agreement if the Regional Director believes the employer has so abused the process that the settlement will not effectuate the purposes of the Act. See, e.g., *Jefferson Hotel,* 309 NLRB at 706; see also *Douglas-Randall* supra, 333 F.3d at 222 ("If, in a case such as this one, the Regional Director is convinced that the employer is guilty of unfair labor practices, he can either decline to approve an informal settlement agreement and insist that the unfair labor practices be adjudicated or require an admission of liability from the employer as a condition of settlement.").[12]

Our dissenting colleagues argue that *Douglas-Randall*'s limitation of the petitioner's right to seek a decertification election is justified by the unfair labor practice allegations and the remedial steps that the employer agreed to take. This assumes, however, that the employer is guilty of the conduct with which it has been charged. We reject this assumption. Without a finding of liability or an admission of wrongdoing, there is no substantial evidence that the employer engaged in the alleged unfair labor practices. Like former Members Cohen and Hurtgen, we find that the Board's decision in *Douglas-Randall* wrongly gives determinative effect to unproved allegations. Indeed, an employer in this circumstance is merely agreeing to take certain actions to secure a dismissal of pending unfair labor practice charges—nothing more and nothing less. *BPH & Co.,* supra, 333 F.3d at 222. To assume otherwise is inconsistent with fundamental due process.

Our dissenting colleagues also contend that the policies of maintaining stable labor relations and promoting the peaceful settlement of disputes outweigh employees' rights to seek a decertification election under these circumstances. We believe, however, that this fails to ascribe sufficient importance to employees' fundamental Section 7 rights; indeed, it seriously impinges on them. When an employer and a union settle outstanding alleged unfair labor practices and are in the process of negotiating, or entering into, a new collective-bargaining agreement, *Douglas-Randall* requires the dismissal of a decertification petition filed prior to the settlement, and the Board's contract-bar rules bar any other petition up to 3 years. The result fixes in place the union's representative status for years, regardless of the legitimacy of the showing of support underlying the decertification petition.[13] Maintenance of stable collective-bargaining relationships is important, but only when employees have freely chosen whether, and by whom, to be represented. The peaceful settlement of disputes is also important—but not so important that it should be obtained at the expense of abrogating employees' Section 7 rights to reject or retain a union as their collective-bargaining representative.

Moreover, it is not the case, as our colleagues contend, that a return to *Passavant* renders settlement agreements "illusory." Having agreed to bargain, the employer has a duty to honor that agreement notwithstanding the proc-

[12] If the employer has committed unlawful conduct, and if there is a factual finding of causal nexus between that conduct and that petition, the petition can be dismissed. See *Saint Gobain Abrasives,* 342 NLRB at 434.

[13] *General Cable Corp.,* 139 NLRB 1123 (1962).

essing of the decertification petition. The dissent suggests that without *Douglas-Randall,* employers will succumb to the temptation to evade good-faith bargaining in hopes that delay will undermine the union's support and help secure a vote to decertify. We think this suggestion is more speculative than real. Employers will surely understand that the union may want to have a basis on which to file a charge that would again block the petition. We think it more likely that employers will be at pains to conduct themselves appropriately in promised bargaining so as to avoid a further blocking charge situation.

Our dissenting colleagues submit that we fail to set forth empirical evidence showing that *Douglas-Randall* was "unworkable, failed in practice or failed to further statutory policy interests." We search in vain in the *Douglas-Randall* majority opinion for a like justification for *its* change of course from then-extant precedent. More to the point, we explain fully herein why we reject *Douglas-Randall.* That decision went too far in sacrificing fundamental Section 7 rights in the name of stability and fostering settlement. In truth, contrary to our colleagues' assertion that *Douglas-Randall* "puts first things first," that decision put the cart before the horse. When a question concerning representation has been raised pre-settlement, the determination of whether unit employees wish to continue to be represented *at all* is preliminary to questions of stability and peace between the union and the employer. If employees do not so wish, the union is no longer on the scene to *have* a bargaining relationship with the employer or to *engage* in disputes that may be settled. Even if *Douglas-Randall* was "workable," it did not strike an appropriate balance among the competing interests.

Based on all of the above, we overrule *Douglas-Randall* and its progeny and return to the Board's prior holdings for handling decertification petitions when the parties have resolved concurrent unfair labor practice allegations by entering into either a settlement agreement or collective-bargaining agreement. Thus, an employer's agreement to resolve outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union, or by entering into a collective-bargaining agreement, will not be treated as an admission of wrongdoing unless it expressly so provides, and will not require dismissal of a decertification petition challenging the union's majority status filed after the alleged unlawful conduct but prior to settlement.[14] When the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, that contract will, of course, continue to serve as a bar to newly filed petitions under the Board's contract-bar rules, but it will not bar a petition filed prior to the agreement. Pursuant to nearly one-half of a century of Board precedent, that petition relates back to the date it was filed.[15]

Here, a decertification petition was timely filed during the window period of the parties' prior collective-bargaining agreement. Thus, that contract does not bar reinstatement of the decertification petition.[16] Further, there is no evidence that the showing of interest supporting the decertification petition is insufficient or that the Employer or its supervisors were impermissibly involved in the decertification effort. The Employer and the Union entered into a subsequent collective-bargaining agreement to resolve the outstanding unfair labor practice charge. There has been no admission by the Employer, finding by the Board, or evidence presented that the Employer in fact committed the unfair labor practices alleged. Therefore, there is no basis for finding that the decertification petition has been tainted by unlawful conduct. Finally, the Petitioner, who was not a party to the collective-bargaining agreement, did not consent to the withdrawal of the petition.

We therefore reverse the Acting Regional Director's administrative dismissal of the decertification petition. We shall reinstate the petition and remand this case to the Regional Director for further action consistent with this decision, in accord with our prior decisions in *Passavant* and its progeny.

ORDER

The Acting Regional Director's administrative dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action consistent with this Decision.

Dated, Washington, D.C. January 31, 2007

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member
Peter N. Kirsanow,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[14] Nothing in this decision, however, precludes a Regional Director or a union from including the decertification petitioner in settlement discussions. Consistent with our decision in *Jefferson Hotel,* 309 NLRB at 706, we encourage the inclusion of the petitioner in settlement discussions to allow for the possibility that the petitioner could agree to a settlement that provides for the dismissal of the petition. Without the petitioner's agreement, however, we do not intend that the petitioner be bound to a settlement by others that purports to waive the petitioner's right under the Act to have the decertification petition processed. The Regional Director may choose whether to approve a settlement agreement that does not include the petitioner, or instead to go forward with litigating the unfair labor practice case, which could result in the finding of an unfair labor practice violation sufficient to "taint" the petition and require its dismissal.

[15] *City Markets*, 273 NLRB at 469.

[16] *Leonard Wholesale Meats,* 136 NLRB 1000 (1962).

MEMBERS LIEBMAN and WALSH, dissenting.

The "object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers." *Auciello Iron Works, Inc. v. NLRB,* 517 U.S. 781, 784 (1996). To this extent, the Board's task is to strike an appropriate balance between the establishment and maintenance of stable collective-bargaining relationships and employees' freedom of choice in deciding whether they want to engage in collective bargaining and whom they wish to represent them. Today, by overruling *Douglas-Randall, Inc.*, 320 NLRB 431 (1995), the majority fails at this task. *Douglas-Randall* and its progeny[1] strike the proper balance between the various competing interests underlying the Act.[2]

Historically, the Board dismissed decertification petitions filed subsequent to alleged unfair labor practice conduct where the charges were resolved by a Board settlement agreement in which the employer agreed to recognize and bargain with the union. See *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951); *Dick Bros., Inc.,* 110 NLRB 451, 453 (1954). The Board recognized that the settlement of unfair labor practice allegations is a meaningful act, which bears consequences, and must be given due consideration when weighed against the right to decertify a union. *Douglas-Randall* restored this historical practice after an unexplained retreat in *Passavant Health Center,* 278 NLRB 483 (1986). Once again, the majority discards this historical policy, reaffirmed in *Douglas-Randall*, solely on the ground that it limits employees' right to reject a union as their exclusive bargaining representative. In its place, it resurrects the old and unworkable doctrine of *Passavant* and its progeny[3] which can accurately be described as unfortunate aberrations in the Board's jurisprudence.

Far from balancing the competing interests underlying the Act, the majority gives scant attention to the policy of promoting the maintenance of stable collective-bargaining relationships. Indeed, it misreads the *Douglas-Randall* discussion of the meaning of settlement agreements by asserting that the decision gives "determinative weight to the allegations of unlawful conduct." On the contrary, after considering all the interests at issue, *Douglas-Randall* gives determinative weight to the *resolution* of allegations of unfair labor practices. As a result of this misunderstanding, the majority also ignores the Act's goal of promoting the peaceful settlement of disputes. For these reasons, their rationale for departing from well-settled precedent is flawed. We dissent.

I. FACTS

The essential facts are as follows. The Union represents the Employer's drivers and was a party to a collective-bargaining agreement with the Employer that was effective from March 19, 2000, to October 31, 2002.

On December 7, 2001, the Union filed an unfair labor practice charge in Case 1–CA–39545–1 against the Employer alleging that the Employer violated Sections 8(a)(1), (3), and (5) and 8(d) of the Act by unilaterally changing the health care and pension benefit packages, failing to notify the Union of the unilateral changes, sending correspondence directly to employees concerning the unilateral changes, and holding discussions directly with the employees concerning the unilateral changes without a representative of the Union being present. The Union contended that the Employer refused to bargain over the health care and pension benefits and that its actions constituted a unilateral modification and a repudiation of the collective-bargaining agreement. The Union also alleged that the Employer failed to make a required "contract ratification" payment to employees, thereby breaching the collective-bargaining agreement. On February 5, 2002, the Region deferred the charges to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971). Key to the Regional Director's decision to defer was the Employer's willingness to arbitrate the dispute underlying the charges. No administrative determination was made in the case.

Arbitration in the case was not scheduled despite repeated requests by the Union. Initially, the Employer failed to respond to the Union's requests for arbitration during February and March 2002. However, in late March/early April 2002, the parties agreed to enter into early contract negotiations and to discuss resolving the pending unfair labor practice charges. If negotiations of the charges proved fruitless the parties would proceed to arbitration. Early negotiations were set to commence on or about June 11, 2002. On May 31, 2002, the Employer changed its mind and indicated that it would not engage in early contract negotiations unless the Union withdrew the unfair labor practice charges. On June 3, 2002, the Union refused to withdraw the unfair labor practice charges and again demanded arbitration.[4] On July 7, 2002, the Union notified its membership that

[1] See *Liberty Fabrics, Inc.,* 327 NLRB 38 (1998); *Supershuttle of Orange County,* 330 NLRB 1016 (2000).

[2] See generally *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001); *MV Transportation,* 337 NLRB 770 (2002). (Member Liebman, dissenting).

[3] See *Island Spring,* 278 NLRB 913 (1986); *Nu-Aimco, Inc.,* 306 NLRB 978 (1992); *Jefferson Hotel,* 309 NLRB 705 (1992).

[4] Thereafter, in June 2002, the Union, in accordance with the collective-bargaining agreement, proposed certain arbitrators. The Employer responded by demanding that the Federal Mediation and Conciliation Service (FMCS) appoint a panel of arbitrators. On or about September 10, 2002, the parties submitted the matter to the FMCS for the appointment of an arbitration panel. Arbitration of the Union's charges in Case 1–CA–39546–1 was never conducted due to the parties' negotiation and resolution of the charges.

> Teamsters Local 633 of New Hampshire has informed Tru-Serv that we are not receptive to withdrawing our charges against the Employer prior to discussing and attempting to resolve the issues; thus Tru-Serv has, through corporate counsel and Teamsters 633 counsel, agreed to proceed to arbitration.
>
> The early negotiations agreed to by the Employer and Teamsters 633 for next week have been postponed, as I would not agree to withdraw the grievances prior to discussion and negotiations.

On August 9, 2002, the Petitioner, a driver, filed a petition to decertify the Union as the exclusive bargaining representative of the unit. On August 13, 2002, the Regional Director found that this petition was "blocked" by the pending unfair labor practice charges and held the petition in abeyance pending the disposition of the charges. Neither the Petitioner nor the Employer sought Board review of the decision.

On or about October 1, 2002, the parties commenced negotiations for a successor collective-bargaining agreement. On February 16, 2003, the drivers ratified an agreement for the term of November 1, 2002, to October 31, 2005. At that time, the parties also settled all outstanding unfair labor practice allegations by entering into a separate "Letter of Understanding." The Employer agreed that it would reimburse the drivers for the difference in medical plan reimbursements from September 1 to December 31, 2001, as a result of its unilateral change. The Employer additionally agreed to a "guarantee" of the pension calculation at present levels through October 31, 2005, and to reimburse the drivers for the differences in pension benefit calculation from January 1, 2002, the date of its unilateral change, to October 31, 2002.[5] As part of the agreement, the Union agreed to withdraw its pending unfair labor practice charges. As intended by the parties, no unfair labor practice issues remained unresolved following the negotiation of the collective-bargaining agreement. On May 9, 2003, the Employer signed the collective-bargaining agreement, and on May 23, 2003, the Union filed a letter with the Region withdrawing the unfair labor practice charges.

On June 13, 2003, the Acting Regional Director dismissed the petition for decertification in accordance with the Board's decision in *Douglas-Randall* and its progeny. In response to the Acting Regional Director's decision, on June 23, 2003, the Petitioner filed a request for review, asserting, in part, that the petition was initiated because, "[w]e do not have a union pension or medical benefits—that is why I started this petition." On July 7, 2003, the Employer filed a request for review urging the Board to overrule its decisions in *Douglas-Randall, Liberty Fabrics*,[6] and *Supershuttle of Orange County*.[7] On August 17, 2004, the Board majority granted the Employer's and Petitioner's requests for review. We dissented from the majority's grant of review.

II. ANALYSIS

A. The Central Rationale of Douglas-Randall

The *Douglas-Randall* decision relied principally on the policy established in *Poole Foundry & Machine Co.,* supra, and *Dick Bros., Inc.,* supra, of dismissing a decertification petition filed after a settlement agreement which contains a bargaining provision.[8] In *Douglas-Randall*, the union and the employer had an established bargaining relationship which was disrupted by the employer's alleged unfair labor practices. These unfair labor practices predated the filing of the decertification petition. By settling the unfair labor practice allegations, the parties sought to remedy the disruption in their relationship.

The *Douglas-Randall* decision concluded that the settlement required dismissal of the decertification petition. The central rationale underlying this policy is that the settlement of unfair labor practice allegations is a meaningful act, which bears consequences, and must be given due consideration when weighed against the right to decertify a union. The Board decided that some limitation of the petitioner's right to seek decertification was justified by the unfair labor practice allegations, and by the

[5] In exchange for the $250 bonus identified in the Union's charge, the Employer agreed to provide a "ratification bonus" consisting of backpay for the drivers from November 1, 2002, through February 16, 2003, plus a lump sum of $150.

[6] 327 NLRB 38 (1998).

[7] 330 NLRB 1016 (2000).

[8] In *Poole,* the Board found that the employer and the union were entitled to a reasonable time, free from rival claims and petitions, within which to effectuate the provisions of the settlement agreement. The Board reasoned that unless the employer was obligated to honor the agreement, the agreement would not have achieved its purpose. *Poole Foundry & Machine Co.,* 95 NLRB at 36. In enforcing the Board's Order, the Fourth Circuit endorsed the Board's reasoning and explained that if a settlement agreement is to have real force, a reasonable time must be afforded in which a status fixed by the agreement is to operate. Otherwise, the settlement agreement might have little practical effect as an amicable and judicious means to expeditious disposal of disputes arising under the terms of the Act. *Poole Foundry & Machine Co. v. NLRB,* 192 F.2d 740, 743 (4th Cir. 1951).

The decertification petition in *Poole* was filed after the employer and the union entered into a settlement agreement containing a bargaining provision. Today's majority, like the dissent in *Douglas-Randall,* mentions this distinguishing fact but fails to provide any valid analysis as to why the principles of *Poole* are inapposite to the current case. Conversely, the majority in *Douglas-Randall* noted this distinguishing fact, and fully discussed why *Poole*'s rationale applied equally to cases like *Douglas-Randall,* where the petition was filed before the parties entered into the settlement agreement but after commencement of the unlawful conduct. See *Douglas-Randall,* 320 NLRB at 432.

Additionally, in *Dick Bros.,* the Board found that the parties to a settlement agreement executed a contract within a reasonable time, which fulfilled the purpose of the settlement agreement. The Board concluded that the settlement agreement, as well as the contract, precluded an election at that time and dismissed the decertification petition. See *Dick Bros.,* 110 NLRB at 454.

remedial steps the employer voluntarily undertook to remedy these allegations.

The Board also recognized that there might be some tension between the employer's concern that it not be treated as if it had committed unfair labor practices and the need to give effect to the remedial provisions of the settlement agreement. The Board concluded, however, that without giving normal remedial effect to the settlement agreement's provisions, the Board would render such agreements largely illusory.[9] In order to have meaning, the Board reiterated that a settlement agreement in which the employer agrees to recognize and bargain with the union must permit bargaining to take place for a reasonable period of time without a challenge to the union's representative status. The Board determined that the logical extension of this protection for bargaining is that if a collective-bargaining agreement is reached, it should be given effect.

The Board's decision in *Liberty Fabrics*, supra, again relied on the rationale of *Poole* and *Dick Bros*., to extend *Douglas-Randall* to a case where the parties resolved their dispute through a non-Board settlement agreement rather than a Board settlement. There, alleged unfair labor practices predated the petition. The parties then resolved their dispute over the alleged misconduct through collective bargaining, resulting in the execution of a contract, which contained a provision for the withdrawal of the charges. The Board observed that the "parties bargained and reached a mutual agreement; an agreement that has definite legal intent, that will safeguard the public interest in this proceeding and, on which, the Regional Director relied in approving the withdrawal of the charges." *Liberty Fabrics*, 327 NLRB at 39. The Board concluded that this non-Board settlement should be given the same effect as the Board settlement in *Douglas-Randall*. Accordingly, the Board dismissed the decertification petition because the parties' contract precluded a question concerning representation.

Similarly, in *Supershuttle of Orange County*, 330 NLRB 1016 (2000), the Board extended *Douglas-Randall's* rationale to a situation where the parties reached agreement on a collective-bargaining agreement intended by them to resolve pending unfair labor practice charges concerning conduct that predated the decertification petition. Unlike *Douglas-Randall* and *Liberty Fabrics*, there was no Board or non-Board settlement agreement resolving the charges and no complaint had issued on the charges. The Board observed that the key to the *Douglas-Randall* and *Liberty Fabrics* decisions is that the parties resolved the outstanding unfair labor practice allegations. The Board stated: "The result in neither case was dependent on the method the parties used to resolve those allegations." *Supershuttle of Orange County,* 330 NLRB at 1017. The Board concluded that the rationale of *Douglas-Randall* and *Liberty Fabrics* squarely applied in *Supershuttle*, where the Acting Regional Director found that the parties resolved all the unfair labor practice allegations when they agreed to their new collective-bargaining agreement. As to the absence of a complaint in *Supershuttle*, the Board observed that there had been no administrative determination that the unfair labor practice charges should be dismissed as lacking merit. In fact, there had simply been no administrative determination on the merits of the charges. The Board's decision in *Supershuttle* made it clear that the heart of the *Douglas-Randall* analysis lies in the historic value placed on the peaceful settlement of disputes.

B. Douglas-Randall Appropriately Balances the Act's Competing Interests.

By requiring the dismissal of a decertification petition after parties have resolved concurrent unfair labor practice allegations by entering into a settlement, *Douglas-Randall* and its progeny create a framework that properly fosters the peaceful settlement of disputes and promotes stable collective-bargaining relationships, without needlessly prejudicing employees' Section 7 rights. In contrast, processing a decertification petition after the peaceful settlement of unfair labor practices, under *Passavant* and its progeny, solely in the name of Section 7 free choice, undermines these other central policies of the Act.

First, *Douglas-Randall* and its progeny foster the peaceful settlement of disputes.[10] The decision recognizes that settlement of unfair labor practice allegations is a meaningful act that must be given normal remedial effect. Indeed, without giving normal remedial effect to the settlement agreement, the Board renders such agreements largely illusory.

"The Board's policy favoring the peaceful resolution of disputes without litigation, inter alia, through settlement agreements, is too longstanding and well established to require extensive comment." *Courier-Journal,* 342 NLRB 1148, 1148 (2004). As the Board observed in *Independent Stave Co.,* 287 NLRB 740 (1987), "[t]he purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them." Id. at 741, quoting *Wallace Corp. v. NLRB,* 323 U.S. 248, 254 (1944). Indeed, if it could not dispose of the majority of cases without recourse to litigation, through informal mechanisms including settlements, the Board simply could not function

[9] Referring to former Member Johansen's dissent in *Passavant,* the Board stated: "to reinstate the decertification petition would, for all practical purposes, deprive the union of that which it settled, and relieve the employer of much of the substantive obligation to which it, in turn, agreed." *Douglas-Randall*, 320 NLRB at 434.

[10] See *NLRB v. Columbus Printing Pressmen No. 252*, 543 F.2d 1161, 1169 (5th Cir. 1976) ("[T]he peaceful settlement of disputes is unquestionably an important purpose of the Act."); *Airport Parking Management v. NLRB*, 720 F.2d 610, 614–615 (9th Cir. 1983) ("The general policies of the Act and of labor law favor the private, amicable resolution of labor disputes whenever possible.").

effectively. See *Poole Foundry & Machine Co. v. NLRB*, supra; *Hotel Holiday Inn de Isla Verde v. NLRB,* 723 F.2d 169, 173 fn. 1 (1st Cir. 1983).

This policy can be effective, however, only if it brings closure to the settled disputes and repose to the parties. This is precisely the result under *Douglas-Randall.* Once a settlement is reached, it is given full effect and the original dispute is laid to rest by the dismissal of the decertification petition. However, under *Passavant*, precisely the opposite happens. The reinstatement of the decertification petition undermines the settlement agreement the parties executed. For all practical purposes, it deprives the union of that which it settled, and relieves the employer of much of the substantive obligation to which it, in turn, agreed.

A union or employer enters a settlement agreement with the implicit understanding that each party's promise will be fulfilled. As the *Douglas-Randall* majority noted, employers agree to settle in order to avoid litigation when the General Counsel has found probable merit to the charge or is considered likely to make that finding. When, pursuant to a settlement agreement, the charges are withdrawn and complaint dismissed, the employer has obtained fulfillment of the union's promise and has achieved its goal of avoiding costly litigation. On the other hand, unions generally agree to settle unfair labor practice charges involving employers' refusal to recognize and bargain in order to obtain promptly the recognition and bargaining to which they claim they are entitled. *Douglas-Randall*, 320 NLRB at 433–434.

But under the *Passavant* line of cases, the positions of the parties are reversed. Unions are understandably reluctant to settle because they still must contend with the decertification petition. On the other hand, employers are eager to settle because settlement clears the way for resumption of decertification efforts, despite any potential effects of the previously alleged employer unfair labor practices.[11]

Second, *Douglas-Randall* and its progeny encourage the maintenance of stable collective-bargaining relationships.[12] In order to have meaning, a settlement agreement in which the employer agrees to recognize and bargain with the union must permit bargaining to take place for a reasonable period of time without a challenge to the union's representative status. *Douglas-Randall* puts first things first. It leaves for another day a re-testing of the incumbent union's majority status. This frees the union from what the Supreme Court has called "exigent pressure to produce hot-house results or be turned out." *Brooks v. NLRB,* 348 U.S. 96, 100 (1954). At the same time, the employer is freed of the temptation to avoid good-faith bargaining in the hope that, by delay, it can undermine the union's support among employees and get them to vote against continued representation. Id. The rule of *Douglas-Randall* allows the employer and the incumbent union to bargain without the uncertainty and disruption that might be caused by a decertification campaign, a potential destabilizing factor. The Board has recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit. See *Levitz Furniture Co. of the Pacific,* 333 NLRB at 720. The logical extension of this protection for bargaining is that if a collective-bargaining agreement is reached, it should be given effect. "One of the best ways to encourage collective bargaining is to allow for the enforcement of contracts arrived at through collective bargaining." *Electrical Workers Local 666 v. Stokes Electrical Service,* 225 F.3d 415, 425 (4th Cir. 2000).

In contrast, the reinstatement of decertification petitions under *Passavant* undermines collective bargaining and leads to anomalous results. Had the unfair labor practices not been settled but rather concluded by a finding by the Board that the unfair labor practices had been committed, the decertification petition would have been dismissed without the possibility of subsequent reinstatement. As to both the employer and the union, the remedial obligations under a settlement agreement (to bargain in good faith and execute any resultant collective-bargaining agreement) are awkwardly juxtaposed with the circumstance that the decertification petition remains outstanding and another election will take place without regard to what may be accomplished through good-faith bargaining.

It is the Board's obligation to promote stable collective-bargaining relationships and "to protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment." *Sea Bay Manor Home for Adults,* 253 NLRB 739, 741 (1980). *Douglas-Randall* fulfills these obligations. By reaching a settlement agreement and/or a new collective-bargaining agreement, the parties have repaired their otherwise disrupted bargaining relationship. Dismissing the decertification petition is the last step in this process and allows the parties to forge ahead in a climate of stable labor relations. On the other hand, under *Passavant*, the collective-bargaining relationship remains disrupted until the union re-establishes its majority status in an election. Even if and when the union wins an election, its attention has been diverted from its representational functions and its stature as the employees' representative has been weakened.

Moreover, under the *Passavant* line of cases, the Board and the parties frequently have to engage in what would otherwise be unnecessary destabilizing litigation

[11] Cf. *Courier-Journal,* 342 NLRB at 1149 ("[O]nce their disputes have been finally settled, parties should not be able to circumvent settlement agreements by later attempting to revive those disputes.").

[12] See *NLRB v. Norfolk Southern Bus Corp*., 159 F.2d 516, 519 (4th Cir. 1946) ("[F]or it must not be forgotten that one of the purposes of the act is to encourage collective bargaining."). [sic]

before such cases can be resolved. There is little incentive for a union to agree to withdraw a charge absent an agreement that the decertification petition will not be reinstated. However, even if the union and employer agree to preclude further processing of a decertification petition, the petitioner is not bound by the settlement agreement, absent the petitioner's consent to the dismissal or an admission of wrongdoing by the employer. Practically, under *Passavant,* if the petitioner does not agree to withdraw his or her petition, Regional Directors would be reluctant to approve proposed settlement agreements. As a result, parties and the Board have spent time and money on fruitless settlement negotiations, and then will be forced to expend additional scarce resources on litigation. The Board's policies are served far better by a practice that encourages the actual parties to an unfair labor practice proceeding to join in an amicable, judicious, and definitive resolution of the case.[13]

Despite the foregoing, the goals of promoting peaceful settlements and encouraging collective-bargaining relationships are not the Board's only concerns; so is protecting employee free choice. But *Douglas-Randall* and its progeny does this, too. *Douglas-Randall* protects free choice by ensuring that decertification petitions tainted by employers' alleged unfair labor practices are not processed. Indeed, in this case, according to the Petitioner, the petition was initiated because, "[w]e do not have a union pension or medical benefits." It is not a coincidence that the Employer's unilateral change in health care and pension benefits was the subject of the Union's unfair labor practice charges. The Employer's conduct tainted the Petitioner's views of the effectiveness of the Union and he subsequently filed a decertification petition. Further, this alleged conduct was in direct derogation of the parties' bargaining relationship.

As a result, dismissal of the petition is warranted. It is true that dismissal of the petition limits to some extent the petitioner's right to seek decertification of the union. This temporary limitation, however, is justified by the unfair labor practices that the employer has allegedly committed and by the steps it has voluntarily taken to remedy the disruption in its bargaining relationship. A settlement agreement clearly manifests an administrative determination by the Board and/or the parties that some remedial action is necessary to safeguard the public interests intended to be protected by the Act. See *Poole,* 192 F.2d at 743.[14] Further, there is nothing permanent about dismissing the decertification petition. "[I]f, after the effects of the employer's acts have worn off" and the Union has been "permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," the Board may, upon a proper and timely showing, entertain a new decertification petition if the employees desire to decertify the Union. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 613 (1969).[15] "That employees who oppose union representation may be required to wait to express their views, as a means of furthering the Act's other policies, is neither unreasonable, nor unfair." *MV Transportation*, 337 NLRB 770, 779 fn. 10 (2002) (Member Liebman, dissenting).[16]

C. The Majority's Criticisms of Douglas-Randall Are Flawed

The majority incorrectly argues that the reasoning behind *Douglas-Randall* does not withstand scrutiny. In *Douglas-Randall* the Board expressed concerns that processing a petition in this type of circumstance would discourage settlement or resolution of charges. The majority disagrees, contending that its approach seems more likely to foster settlements. Its reasoning is unpersuasive. As a matter of common sense, under *Passavant*, unions will naturally be less willing in the future to settle cases and more inclined to attempt to force every case to a hearing in order to forestall reinstatement of the decertification petition. Such a result would only lead to needless litigation and delay, frustrating the policies of the Act and the Board's longstanding policy of favoring the peaceful nonlitigious resolution of disputes. The policies of the Act are served far better by a practice which not only encourages all parties to join in an amicable resolution of an unfair labor practice case but also gives full effect to the resultant agreement.

The majority also contends that *Douglas-Randall* and its progeny give determinative effect to unproved allegations of unfair labor practices. However, it must be remembered that although a settlement agreement does not establish that a party has committed an unfair labor practice, it is not analogous to a dismissal of the charge.[17] Rather, a settlement agreement "is quite different from a dismissal" of an unfair labor practice charge. *Poole*, 192 F.2d at 742.[18] As the Fourth Circuit observed in *Poole*:

[13] See *Jackman v. NLRB*, 784 F.2d 759, 764 (6th Cir. 1986) ("Settlement agreements achieved by the General Counsel permit the Board to concentrate its quasi-judicial activities on other matters, thereby enhancing its overall efficient administration.").

[14] See also *W.B. Johnston Grain Co. v. NLRB,* 365 F.2d 582, 587 (10th Cir. 1966) ("[T]he Board, by entering into the settlement agreement, clearly manifested an administrative determination by it that some remedial action was necessary and it made concessions to secure the remedial action provided for by the settlement agreement.").

[15] In *Gissel,* the Supreme Court rejected the argument that a bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' Sec. 7 right of free choice. *NLRB v. Gissel Packing Co.,* 395 U.S. at 612–613.

[16] Cf. *Electrical Workers Local 666 v. Stokes Electrical Service,* 225 F.3d at 425 ("In the circumstances of this case, the policy of employee free choice does not over-ride the policy of encouraging voluntary agreements through collective bargaining.").

[17] See *Recent Case*, *Labor Law-In General-Employer Must Comply With Settlement Agreement Containing Promise to Bargain, Despite Union's Subsequent Loss of Majority*, 65 Harv. L. Rev 891, 891 (1952) ("And while the settlement agreement does not establish that the employer has committed an unfair practice, it indicates some probability of guilt, or else the Board would dismiss the charge.").

[18] See also *Douglas-Randall,* 320 NLRB at 433 ("a settlement . . . is not the same as a dismissal of [an] unfair labor practice allegation").

''While not an admission of past liability, a settlement agreement does constitute a basis for future liability and the parties recognize a status thereby fixed.'' Id. at 743. To treat the alleged conduct as if it had never occurred—which is the case with a dismissal of a charge—could, in these circumstances, result in the decertification of the union while unfair labor practices tending to cause employee disaffection remain unremedied. *Douglas-Randall* and its progeny rightly preclude this result, which is inconsistent with protecting genuinely free employee choice.[19]

Douglas-Randall has been the law for some 10 years. The majority cites no empirical evidence whatsoever that the decision was somehow unworkable, failed in practice, or failed to further statutory policy interests.[20] Contrary to the majority's suggestion, the decision was not an abrupt reversal of course. It was a correction of course, returning the Board to its longstanding policies, as expressed in *Poole* and *Dick Bros.,* for handling decertification petitions (or other petitions challenging unions' majority status) when the parties have resolved concurrent unfair labor practice allegations by entering into a settlement agreement.

III. THE PROPER RESOLUTION OF THIS CASE

The Union filed an unfair labor practice charge against the Employer under Section 8(a)(5) and (1) of the Act when the Employer unilaterally and without prior notice to the Union, changed the health care and pension benefit packages, held discussions directly with the employees concerning the changes, and refused to negotiate the changes with the Union. After the union filed the unfair labor practice charges, the Petitioner filed the instant decertification petition. The Regional Director determined that the petition was "blocked" by the outstanding unfair labor practices charges. Over the course of several months, the parties negotiated and agreed to a 3-year successor collective-bargaining agreement that included specific terms to resolve the pending unfair labor practice charges. Based on the resolution of the unfair labor practice charges, the Union agreed to withdraw its unfair labor practice charges. As such, the Acting Regional Director properly dismissed the petition for decertification in accordance with the Board's decisions in *Douglas-Randall* and its progeny.

IV. CONCLUSION

The majority opinion zealously embraces *Passavant* and its progeny under the guise of protecting employees' Section 7 right to decertify their collective-bargaining representative. It ignores the competing interests that arise when pending unfair labor practice allegations predate a decertification petition and the employer and union have resolved those allegations, by settlement agreement, or through a collective-bargaining agreement. Nor does *Passavant* itself adequately address these conflicting interests. It thus leads to a one-sided and flawed position. For this reason, we would adhere to *Douglas-Randall,* which acknowledges the tension between rights and policies and resolves that tension in a manner which properly effectuates the purposes of the Act. Consequently, we dissent.

Dated, Washington, D.C. January 31, 2007

Wilma B. Liebman, Member

Dennis P. Walsh, Member

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[19] In analogous situations, the desire to infuse stability into the bargaining process has been deemed paramount to the right of employees to change their union affiliation at will. Thus, the status of a certified union may not be questioned for 1 year following certification. See *Brooks v. NLRB,* 348 U.S. at 103.

[20] Indeed, this is a pattern in many other recent reversals of precedent in which we have dissented. See *IBM Corp.,* 341 NLRB 1288 (2004); *Brown University,* 342 NLRB 483 (2004); *Oakwood Care Center*, 343 NLRB 659 (2004).